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IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted]131

TINA DEAL, a minor, by Frank L. Deal, her father and next friend, *et al.*,
Petitioners,

v.

CINCINNATI BOARD OF EDUCATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on December 6, 1966.

Opinions Below

The opinion of the district court is reported at 244 F. Supp. 572 (S.D. Ohio, 1965) and appears at page 258a.[1]

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[1] The record citation referred to above and hereinafter as (——a) is that portion of the record printed in connection with the hearings in the court of appeals. This volume contains pages 1a-282a. By order of the court below, petitioners were not required to print the exhibits and a 71 page stipulation introduced at trial. The exhibits are collected in a bound blue volume entitled "Exhibits to Appendix of Plaintiffs-Appellants." This volume is separately indexed and paginated 283a-479a. The stipulation appears in a red volume, is separately indexed and will be referred to as Stipulation ——, p. ——. Plaintiffs' Exhibit 4 is also bound separately. Reference is also made to respondents' appendix which appears in a green volume and is paginated ——b. The appendix attached to the petition is referred to as App. ——a.

as a part of the record below. The opinion of the court of appeals is reported at 369 F. 2d 55 and is appended hereto *infra* at page App. 1a.

Jurisdiction

Judgment of the court of appeals was entered on December 6, 1966. Petitioners were given to and until May 5, 1967 in which to file this petition pursuant to an order by Mr. Justice Brennan entered on March 2, 1967. The jurisdiction of this Court is invoked under Title 28, Section 1254(1).

Questions Presented

1. Whether Negro students' complaint that they are deprived of equal educational opportunities as a result of public school board policies which confine them to racially imbalanced schools states a cause of action under the Fourteenth Amendment in the absence of school board contrivance.

2. Whether, consistent with the due process requirements of the Fourteenth Amendment, a school board may refuse to develop reasonable alternatives to policies and practices which isolate and thereby impair the learning ability of Negro students.

Preliminary Statement

Negro petitioners, by their complaint filed in November 1963 and the evidence presented at trial in June 1965, sought to challenge, *inter alia*, the Cincinnati Board of Education's (hereinafter called the school board) failure to undertake reduction of systemwide racial imbalance which deprived them of and denied to them equal educational opportunity as required by the Fourteenth Amendment to the Constitution of the United States. Evidence was introduced to show that (1) the school board's past practice of maintaining dual schools and present acts of racial gerrymandering were directly responsible for the present resultant segregation complained of; (2) the existing racial isolation in the schools was being perpetuated, entrenched and extended as a by-product of racially discriminatory practices engaged in by the public agencies as well as private parties which control the housing market; and (3) psychological and educational damage is inflicted upon Negro children because of and by virtue of their confinement in racially imbalanced schools.

The court below ruled that a denial of equal opportunity resulting from acts of the school board that are not racially motivated does not make out a cause of action under the Constitution or laws of the United States; and that the participation of public agencies in the creation of racially segregated residential enclaves which, when coupled with the policies of the school board inexorably results in school segregation, bears no relevance to the instant complaint.

By remanding this cause to the trial court solely for presentation of evidence to prove specific instances of gerrymandering by the school board and to support those allegations in the complaint that Negro children are provided with inferior programs in certain schools, the court below has ruled that the denial of educational opportunity resulting from racial imbalance cannot be the basis of

relief. Thus, it has in fact entered judgment authorizing the maintenance and continuance of a racially imbalanced school system absent school board contrivance, no matter what the resultant deprivation of equal educational opportunities to Negro children.

Although the remand back to the district court is for the taking of additional evidence and for findings on the issues "of claimed discrimination in specific schools and programs and claimed harm to Negro students" (App. 16a), the tenor of the court's opinion leaves little doubt that any additional testimony and findings would be limited to racially motivated school board decisions and inferior programs in racially imbalanced schools. The court of appeals' decision thus increases the burden which would have been placed upon petitioners under the moribund "separate but equal" doctrine in that pursuant to the court's opinion not only must petitioners establish the existence of concrete inferior facilities, but it must also be shown what harm is caused thereby.

Because the theory that the administrative policies and practices of the school board necessarily bring about racial isolation of Negro children and a resultant unconstitutional denial of educational quality is central to this case, petitioners urge that the decision below is now ripe for review. See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148; *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427. Even if this Court were to consider the decision below as non-final, it is respectfully submitted that *certiorari* should nonetheless be granted since resolution of the question as to the constitutional or legal validity of denial of equal educational opportunity caused by *de facto* segregation is fundamental to the further conduct of this litigation. See *United States* v. *General Motors Corp.*, 323 U.S. 373, 377; *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3. Cf. *Brady* v. *Maryland*, 373 U.S. 83, 85, n. 1.

While this Court may reach back and correct the claimed constitutional errors existing in the present posture of this cause if the cause is brought here after remand, *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258, petitioners will be barred from developing fully all the issues on the present remand, thereby necessitating a second remand for the taking of additional evidence at some far distant date in the event the court below is in error about the constitutional validity of *de facto* school segregation insofar as it denies equality of educational opportunity. Moreover, preliminary relief to prevent the building of new segregated schools was sought and denied more than three years ago (1a). Further delay in resolving petitioners' basic contention that racial imbalance must be corrected in order for them to obtain an equal education only serves to increase the difficulty of developing an adequate remedy.

For all these reasons petitioners bring the cause here.

Statement

Although the State of Ohio repealed its law requiring separate schools for Negroes in 1887 (93b; 284a), the school board maintained varying numbers of non-districted schools exclusively for Negro children and staffed solely by Negroes, the last of which was closed in 1955 (92b-102b; 284a-289a; Stipulation 61, p. 57). No Negro teacher was permitted to work in a school which contained white children until 1949 (102b).

Ironically, in 1950 when the school board operated four such non-districted Negro schools (Stipulation 61, p. 57), there was more integration in the system than there is today. At that time, only 18% of all Negro children attended secondary schools which were more than 80% Negro; and 45% of the Negro elementary school children

attended schools which were more than 80% Negro that same year.[2]

Fifteen years later, when this case was tried, and when all of the non-districted segregated schools had been closed for at least ten years, the level of segregation had substantially increased. Forty-three (43) per cent of all Negro secondary school children and 63% of all Negro elementary school children in the school system were confined to more than 80% Negro schools. In sum the number of Negro children attending majority Negro schools had risen from seven out of ten to almost nine out of ten.

The school board maintained 96 regular elementary and secondary schools in the 1964-65 school year. Approximately 37% of the 87,760 children attending these schools were Negroes (Stipulation 3, pp. 2-3). One of the seven senior high schools was more than 80% Negro attended and four were more than 80% white attended. Four of the 17 junior high schools were more than 80% Negro attended and six were more than 80% white attended. Fifteen of the 72 elementary schools were more than 80% Negro attended and 37 were more than 80% white attended. Two elementary schools were all Negro and 12 were all-white as were three junior high schools (173b-178b).

The school board claims to district its schools on the basis of natural boundary lines and its objective is to develop schools into neighborhoods "that can communicate in some way" (103a-104a). The superintendent and assistant superintendent testified that "community homogeneity" was a positive attribute to be considered in school districting. The latter called it "a plus factor in the operation of the schools" (126a), while the former stated that one of the advantages of the neighborhood school plan was that it gave school officials knowledge of the back-

[2] These percentages in this and the following paragraph have been calculated from the enrollment figures which appear at 173b-178b.

ground of the families and "their place in the community" (104a). School administrators commonly consider the racial composition of proposed attendance areas as a factor in school districting (86a, 125a, 130a).

After this suit was filed, the school board released a statement that it "would like to avoid predominantly Negro schools . . . [and] is willing to make race of students one of the elements to be considered in the establishment of school attendance lines . . . [but] does not accept the concept of *de facto* segregation and will not agree to any . . . program to attempt to balance races as such" (54b-55b). In the one case where the school board claims to have implemented this policy, it built a new school in a "neighborhood" previously served by one school and planned to district it so there would have existed in the one neighborhood one all-white school and one all-Negro school (42a, 432, 244a). As a result of school board action in purported application of the above policy, the original elementary school showed a 15% increase in Negro attendance to 71% Negro, while the new school opened as a 92% white school (Stipulation 49, pp. 39-40). There was no other evidence of claimed implementation of this new policy, although many projected schools are clearly designated for Negro areas.[3]

Petitioners were denied the right to introduce into evidence an official report prepared by the Ohio Civil Rights Commission in 1964 which concluded that housing was segregated in Ohio cities, including Cincinnati, as a result of the policies of both public and private agencies (150a-

[3] The planned East Evanston, East Avondale and Millvale area schools will be predominantly Negro (61a, 62a, 63a). Examination of Joint Exhibit 271 (165b) which is a map prepared by respondents to indicate projected locations for new schools, reveals that elementary schools are also planned for the Columbian, Cummins, West Evanston and Hays areas. A map of Negro residential areas (112b), shows that these are Negro areas.

151a).[4] However, the testimony of Joseph Murphy, Director of Relocation for the City of Cincinnati Department of Urban Development and responsible for family relocation resulting from all governmental projects (149a), was received. He stated that his department referred Negro families only to those areas where they would be accepted; that his department was aware of the fact that there were certain areas in which Negroes were not accepted and that housing units were made available to his department on a racial basis (149a-150a). A member of the school board also admitted that, to his knowledge, there are areas in Cincinnati where Negroes are restricted from obtaining housing (60a-61a). Before *Shelley* v. *Kraemer*, 334 U.S. 1, restrictive covenants were enforced in the state of Ohio. See *Perkins* v. *Trustees of Monroe Avenue Church of Christ*, 79 Ohio App. 457, 70 N.E. 2d 487 (1946), *app. dismissed*, 147 O.S. 537, 72 N.E. 2d 97 (1947), *judgment reversed*, 334 U.S. 813.

Both petitioners' educational expert, Dr. Phillip Rothman and their social psychologist and race relations expert, Dr. Lee Rainwater, testified that the Negro children who are compelled to attend racially imbalanced schools[5] are seriously harmed thereby (158a, 205a). These experts also made explicit that this harm resulted even though the compulsion to attend the racially imbalanced schools was not the result of state laws requiring a bi-racial school system (159a, 206-207a), and some white children attend the predominantly Negro schools (191a, 207a).

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[4] The report, Discrimination in Housing in Ohio, appears in the record as a separate pamphlet, labeled "Plaintiff's Exhibit No. 4." Petitioners had called the Deputy Executive Director of the Commission in order to introduce and testify about the report (150a-151a).

[5] Dr. Rainwater testified that within a context of the Cincinnati schools and their racial compositions, more than 50% Negro-attended schools were racially imbalanced to the point where they harmed the Negro children in attendance (204a).

To illustrate that Negro children were harmed as a result of their confinement in racially imbalanced schools, Dr. Rothman compared the achievement test results of the 80% or more Negro-attended schools with those of the 80% or more white-attended schools (162a-163a). He found that the learning ability, as measured by I.Q. tests of the children attending the predominantly white schools improved as they went through school, while these tests showed that children attending the predominantly Negro schools lost some of the learning ability they had started with (165a-167a; 167b). The test results further revealed that while the children in the predominantly Negro schools were slightly behind (four-tenths of a grade) the children in the predominantly white schools in reading ability in the second grade, this gap had widened to two and four-tenths grade levels by the eighth grade (167a-168a; 168b). A similar pattern was revealed by study of arithmetic achievement test scores (169a; 169b).

Dr. Rainwater emphasized that even if the children in all the predominantly Negro schools did as well as the children in the predominantly white schools on standardized tests, they would still be damaged:

> . . . In a school system in which the children were doing equally well on tests, one would still expect to find them disadvantaged in the area of developing skill to deal with white societies, disadvantaged in the terms of a negative conception of themselves and feelings that they are somehow different and less worthy persons because of being treated in this way (208a).

This conclusion was based on Dr. Rainwater's earlier testimony that:

> . . . The Negro children attending schools which are heavily Negro . . .. constantly internalize, make as a part of their sense of themselves, the sense that they are Negro, that they are different from the rest of the world—and because of the position of the

> Negro historically in this country, that differentness is a negative thing; . . . they become increasingly discouraged about the possibility of moving out of this kind of situation, and they tend therefore to have lower motivations, and accomplish less, because, well, it simply appears to them, it is not worth trying, it is not worth making an effort in a system which sets you so much apart and so much down—both apart and down (205a).
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> • • •
>
> . . . They learn few of the ways of the white world, few of the skills for dealing with that world, and for operating successfully in that world, and therefore when they finally get out of school and have to move out into the predominantly white world in order to do well at jobs, they are less able to deal with that system as it exists. This has the further effect, of course, that the whites with whom they deal . . . tend to stereotype them further and to feel that they are not as well prepared as a comparable Negro or white child coming from an integrated school system (205a-206a).

At the close of the school board's factual presentation with the exception of expert testimony, and before rebuttal, petitioners' amended complaint was dismissed on a Motion for Judgment.

Reasons for Allowance of the Writ

1. The court below, by ruling that a school board may impair "a Negro student's capacity to learn" (App. 15a-16a) free from constitutional interdiction unless racial motivation is established, has misconceived the reach of the Fourteenth Amendment to the United States Constitution.

No other area of the law better illustrates the dynamic qualities inherent in the Fourteenth Amendment to the United States Constitution than school desegregation litigation. At no time has this Court held that the Fourteenth Amendment's mandate of equal educational opportunities

was affected by the motives of school officials. Before the Court considered segregation as infringing upon the constitutional requirements of equal educational opportunity, it struck down a state's good faith practice of providing Negroes with funds to attend out-of-state educational facilities where equal programs were not available to them at the state university. See *Missouri ex rel Gaines* v. *Canada*, 305 U.S. 337. In subsequent decisions, the Court focused on the question of whether the separation itself denied equality of opportunity. In *Sweatt* v. *Painter*, 339 U.S. 629, 634, "qualities which are incapable of objective measurement" became the pivotal factor in the determination that a state-operated Negro law school would necessarily be inferior to that of the University of Texas. The Court concluded that legal training could not be "effective in isolation from the individuals and institutions with which the law interacts."

McLaurin v. *State Regents*, 339 U.S. 637, further clarified the thesis that any separation at all between Negroes and whites adversely affects the former's ability to learn. Regulations limiting the peer contact available to a Negro graduate student attending an otherwise all-white graduate school were therefore struck down.

Sweatt and *McLaurin* viewed the effect of segregation —the inability of the Negro student to freely associate with the white student—as an unconstitutional limitation on the Negro student's learning experience. When the Court decided *Brown* v. *Board of Education*, 347 U.S. 483, the concepts of the constitutional import of equal educational opportunity distilled from *Sweatt* and *McLaurin* led to the invalidation of segregation in the public schools and the repudiation of the "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537. *Brown* ruled what *Sweatt* and *McLaurin* had intimated and inferred: A separate education for Negroes in a white dominated society is "inherently unequal."

Although the relief granted in *Brown* represented a radical departure from prior cases where the segregated educational structure itself was allowed to stand, the Court adhered to its historic approach of determining whether the challenged practices, no matter what the context in which they arose, limited educational opportunities.

The court below, while reciting the standard established by this Court after more than fifty years of tortuous litigation—that Negroes are entitled to equal educational opportunity—has discarded the underlying philosophy employed in the concept's development. Thus regarded as irrelevant is the basic constitutional question—does racial isolation deny equal education to Negroes?

The court below has read *Brown's* mandate as being operative only against school boards that have acted with open racial hostility. This limitation leads to the absurdity that has developed in the Tenth Circuit. That court affirmed two decisions which have reached diametrically opposed conclusions on the same facts. *Board of Education* v. *Dowell*, — F. 2d —, (10th Cir. decided Jan. 23, 1967), mandates affirmative action to bring about integration, while *Downs* v. *Board of Education*, 336 F. 2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914, imposes no duty to integrate. The sole distinction is one of form, not substance; it rests upon the divergent findings of the trial courts regarding the motivations of the respective school boards. So, too, under the mandate of the court below, some of Cincinnati's schools could be ordered integrated while others would remain segregated on the basis of good or bad faith in each challenged administrative decision.

What both the Tenth Circuit and the court below have lost sight of is the nature of the claim made by segregated children. Their rights to an equal educational opportunity have become contingent upon facts which bear no relationship to the educational process. It is respectfully submitted that *certiorari* should be granted to remove the miscon-

ception that the Fourteenth Amendment does not reach state-imposed deprivations merely because the context in which they occur varies from *Brown*.

2. The school board's failure to operate the schools in a manner which would enable Negro children to progress consistent with their abilities cannot be justified on the ground that these children have not been purposefully singled out for adverse treatment. Fundamental concepts of due process require that the validity of challenged state regulations be determined by their effect. This Court, for example, has made clear that a state may not establish procedures which disadvantage certain persons merely because they do not have the advantages of society's more fortunate members. *Griffin* v. *Illinois*, 351 U.S. 12; *Douglas* v. *California*, 372 U.S. 353.

In *Griffin*, convicted indigents were unable to avail themselves of a right to appeal because they were not provided with a transcript. Rejecting the contention that "[a]ll that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action,"[6] the Court looked to the effect of the law upon economically disadvantaged persons. It ruled that the state's failure to make available to all persons the same opportunity for appeal was violative of both the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

So, too, the Court in *Douglas* struck down a California rule of criminal procedure which required a determination of the California District Court of Appeals before an indigent was entitled to counsel on appeal as of right. Again, the determination was based on the concept that due process is violated when uniformly applied state regulations in-

[6] This view, expressed in a dissent, 351 U.S. at 34, is specifically rejected by the majority at 351 U.S. 17, n. 11.

evitably limit a poor man's ability to defend himself. In neither *Griffin* nor *Douglas* was the state's purpose in establishing procedure—in order to conserve public funds or to avoid overburdening the courts—held to justify the limitations placed upon the individuals affected.

This Court held in *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 224, ". . . a judiciary must judge by results. . . . We cannot undertake a search for motive in testing constitutionality." Similarly, the test of proper apportionment is the result—"one man, one vote"—not motive or cause which led to malapportionment. *Wesberry* v. *Sanders*, 376 U.S. 1. Moreover, the state is under an affirmative duty to insure that "population shifts and growth" do not result in further malapportionment. *Reynolds* v. *Sims*, 377 U.S. 533, 583-584. States cannot, as should not school boards, turn their backs on population shifts, which bring about obvious inequalities.

Petitioners do not here contend that a board of education has the obligation to reduce racial isolation over which it has absolutely no control. Where a school board, however, has chosen to enforce a set of regulations which inexorably must result in racial isolation for a substantial proportion of Negro school children in the face of reasonable alternatives which would deprive far fewer, if any, Negroes of equal educational opportunities, the effect of its regulations must be subject to constitutional challenge. While boards of education must house pupils, their primary constitutional responsibility is to provide educational opportunities for all pupils on an equal basis without distinctions or detriment based upon race.

Petitioners in the instant case face damages far greater than those which plagued the indigents in *Griffin* and *Douglas*. In these latter cases, the state courts at least entertained requests for relief but denied them on the ground that the claims were not meritorious. By contrast, the school board has rejected outright "the concept of

de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such" (Stipulation 11, p. 7). The school board takes this position even though it has been established that its present school districting policies have the effect of hardening patterns of segregation, and result in a denial of educational opportunities to Negro children.

Griffin and *Douglas* might not apply if the school board had chosen the only rational approach toward school districting. The record, however, does not support such a distinction. The school board has not shown that racial imbalance cannot be relieved in its system consistent with sound educational procedures. To the contrary, its superintendent has testified that it is not the duty of the board to achieve balance (117a). Further, he stated that, although he was aware of methods to integrate some of Cincinnati's schools, he was unwilling to recommend their implementation (249a-250a). That solutions are available is now common knowledge. See the 1967 Report of the United States Commission on Civil Rights, *Racial Isolation in the Public Schools,*[7] Vol. I, pp. 140-170. The administrative latitude necessary for the proper functioning of a board of education does not exempt it from the prohibitions against arbitrariness imposed by the Fourteenth Amendment. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637. And arbitrariness, as *Barnette* teaches, exists when "free public education . . . [is] partisan or enemy of any class, creed, party, or faction."

This Court has accepted as a cardinal principle that the Fourteenth Amendment is violated when government regulations are inherently unfair to a particular class. By closing the door on petitioners' complaint, the court below has differentiated the claims of Negro school children from

[7] The report is hereinafter referred to as Racial Isolation in the Public Schools.

all other cases arising under the Fourteenth Amendment. This result is particularly ironic in view of the Amendment's primary purpose of insuring first-class citizenship for Negroes.

3. There is an irreconcilable conflict among the courts of appeals in respect to the basic question raised by this petition—is a valid constitutional claim made where Negro children contend that *de facto* school segregation and racial imbalance deny them equal education? The *ratio decidendi* of the court below is in accord with that of the Seventh Circuit in *Bell* v. *School City of Gary*, 213 F. Supp. 819 (N.D. Ind. 1963), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924. The Fifth Circuit, in *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966),[8] *aff'd. en banc per curiam* (Mar. 29, 1967),[9] has taken a different approach to this question as has the First Circuit in *Springfield School Committee* v. *Barksdale*, 348 F.2d 261 (1st Cir. 1965). The Tenth Circuit (compare *Downs* v. *Board of Education, supra*, with *Board of Education* v. *Dowell, supra*) is in conflict within itself.

Factually, *Jefferson* and the instant case can be distinguished only to the extent that the school boards involved in the *Jefferson* litigation began the process of eliminating its dual school system approximately ten years later than the school board here. Also, the policy of formal segregation was a more universal phenomenon in school districts affected by the decision in the *Jefferson* case. While the court below relies upon the repeal of Ohio's segregation law in 1887 as distinguishing the form of school segregation existing in Cincinnati from that in the South and placing the former beyond the reach of the Fourteenth Amendment, this rationale begs the question. The *Jefferson* decision requires integration when

[8] Hereafter, this opinion will be referred to as Jefferson I.

[9] Hereafter, this opinion will be called Jefferson II.

school districts in the Fifth Circuit reorganize their dual school system into unitary ones. Enforcement of *Jefferson* bars the development of *de facto* school segregation in the school districts in which the *Jefferson* holding is controlling.

No matter how this record is viewed, it is obvious that the shift, beginning in the 1880's, from an openly operated dual school system was not completed until the 1950's. At no time was the school board required to adopt policies and practices which would require integration of the schools, nor did it do so. As a result, there has been an ever-increasing development of racial isolation of Negro students with the consequential deprivation to them of equal educational opportunities. The court below, unlike the court in *Jefferson,* does not seek to halt this isolation but, in fact, condones it as being outside the purview of the Constitution of the United States.

That such an end result could not flow from *Brown* is the basic concept in the *Jefferson* case. It interprets the *Brown* decision as stemming in large part from this Court's holding that segregation was harmful to the educational development of Negro children. The Fifth Circuit echoed its agreement with the 1954 sociological findings when it stated that "denial of access to the dominant culture" results in second-class citizenship for Negroes. (*Jefferson I,* 372 F.2d at 866). While aware that northern and southern school cases could be superficially distinguished on the basis of the existence or nonexistence of overt and express racial discrimination, the Fifth Circuit stated:

> . . . Brown points toward the existence of a duty to integrate de facto segregated schools . . . (*Jefferson I,* 372 F.2d at 875).

The dissenters in *Jefferson II,* although disturbed by the breadth of the relief mandated, took note of the obvious

fact that the *de facto-de jure* distinction is artificial and ignores reality:

> The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or in any other area of the nation which the opinion classified under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violated the constitutional rights of their counterparts, or even their blood brothers, because they were born into a *de jure* society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area. The details of the remedy to be applied, however, may vary with local conditions. Basically, all of them must be given the same constitutional protection. Due process and equal protection will not tolerate a lower standard, and surely not a double standard. The problem is a national one. (Slip opinion, pp. 26-27).

The decision below and *Jefferson* also conflict in that the latter culminates the 5th Circuit's awareness that school segregation problems cannot be considered apart from overall patterns of segregation. As early as 1958 the Fifth Circuit condemned a neighborhood school plan which resulted in school segregation because of segregated housing patterns. See *Holland* v. *Board of Public Instruction*, 258 F.2d 730 (5th Cir. 1958). The interrelationship between school segregation and housing segregation is underscored in *Jefferson I* which cites with approval *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F. Supp. 971 (W.D. Okla. 1965). *Dowell* was in large part predicated upon the trial court's understanding that desegregation necessitated affirmative action by school authorities because of residential segregation.

By contrast, the court below determined that housing segregation, even when caused by the actions of public agencies, was irrelevant to the question of school segregation (App. 7a, n. 4). The court therefore refused to consider the conclusion of the Ohio Civil Rights Commission which found that the state's racial ghettos were the product of both state and private action:

> The major conclusion to be drawn is inescapable. There exists throughout Ohio a consistent pattern whereby Negroes, and other minority groups, are denied free choice in housing. It is invalid to attribute this condition solely to the personal desires or prejudices of home owners. Patterns of exclusion, discrimination and segregation have become institutionalized and constitute a major component of the practices of the housing and real estate business, broadly defined to include real estate brokers and salesmen, landlords, builders and developers, mortgage lending institutions, and governmental housing agencies.[10]

The Fifth Circuit has concluded realistically that racial discrimination in public education cannot be eliminated and the objective of the Fourteenth Amendment to insure equal educational opportunities for Negro children cannot be attained without integration. By contrast the Sixth Circuit has ignored the continuing history of second-class citizenship for Negroes in Cincinnati, and has refused to recognize that the product of racially isolated schools—educationally deprived children—is merely the end result of a publicly and privately inflicted wrong left uncorrected. Being blind to this reality, it has construed the Fourteenth Amendment so narrowly that this guarantee has been stripped of its dynamic quality to secure "equal protection" in all contexts and under all circumstances.

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[10] 1964 Ohio Civil Rights Commission, Discrimination in Housing in Ohio, 48. The report states that Cincinnati was one of the cities studied. It appears in the record as plaintiffs' exhibit 4; however, this exhibit was not admitted (150a-151a).

While the facts in *Jefferson* reveal a more open form of racial segregation than those in the case below, *Springfield School Committee* v. *Barksdale, supra,* indicates how severe racial concentrations may occur in a public school system in the absence of a history of overt discrimination. While the First Circuit vacated a decision on the merits in favor of Negro school children based upon educational deprivation flowing from racially imbalanced schools, the complaint was dismissed without prejudice to institute a new action in the event that the Springfield School Committee did not keep its stated promise to remedy the evil voluntarily and without the necessity of judicial intervention. In short, the First Circuit found that the complaint stated a cause of action upon which relief could be granted. The court held at page 266:

> ... It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happen to be associated with a particular race is no reason for ignoring them.

Thus, the *Barksdale* decision is at variance with the holding in this cause.

The decisions in the Tenth Circuit are irreconcilable. *Downs* v. *Kansas City School Board, supra,* accords with the *ratio decidendi* of this case. *Board of Education* v. *Dowell,* on the other hand, is in harmony with *Jefferson* and *Barksdale.* The difference between the two cases (see Point 1 *ante*) is that the trial court found good faith in the former case and bad faith in the latter. Thus, Kansas City School authorities, in reorganizing from a dual school system to a unitary one, have been permitted to continue practices and procedures which have insured that the racial concentration and separation of Negro and white children re-

mained virtually unchanged when the transformation was completed. In the *Dowell* case, however, the Oklahoma City School Board, in making the transformation, is being required to avoid practices and procedures which will result in *de facto* school segregation.

The law is in a state of confusion among the Circuits as to the scope and reach of the Fourteenth Amendment in respect to practices and procedures which cause racial isolation and result in educational deprivation. In the Fifth Circuit *de facto* school segregation is outlawed, permitted in the Sixth and Seventh, questioned in the Tenth, and disallowed in the First Circuit. It is respectfully submitted that *certiorari* should be granted in this cause so that this conflict and confusion can be finally resolved.

4. This case raises questions of national public importance. Cincinnati's staggering increase in school segregation during the past 15 years has been experienced by virtually every other northern city. See *Racial Isolation in the Public Schools, supra,* Vol. 1. pp. 2-9. The report at p. 190 unequivocally concludes that racial isolation as it exists in Cincinnati and throughout the urban North impairs Negro students' capacity to learn:

> The central truth which emerges from this report and from all of the Commission's investigations is simply this: Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be.
>
> Negro children who attend predominantly Negro schools do not achieve as well as other children, Negro and white. Their aspirations are more restricted than those of other children and they do not have as much confidence that they can influence their own futures. When they become adults, they are less likely to participate in the mainstream of American society, and more likely to fear, dislike, and avoid white Americans. The conclusions drawn by the U.S. Supreme Court about the impact upon children of

segregation compelled by law—that it "affects their hearts and minds in ways unlikely ever to be undone"—applies to segregation not compelled by law.

The major source of the harm which racial isolation inflicts upon Negro children is not difficult to discover. It lies in the attitudes which such segregation generates in children and the effect these attitudes have upon motivation to learn and achievement. Negro children believe that their schools are stigmatized and regarded as inferior by the community as a whole. Their belief is shared by their parents and by their teachers. And their belief is founded in fact.

Isolation of Negroes in the schools has a significance different from the meaning that religious or ethnic separation may have had for other minority groups because the history of Negroes in the United States has been different from the history of all other minority groups. Negroes in this country were first enslaved, later segregated by law, and now are segregated and discriminated against by a combination of governmental and private action. They do not reside today in ghettos as the result of an exercise of free choice and the attendance of their children in racially isolated schools is not an accident of fate wholly unconnected with deliberate segregation and other forms of discrimination. In the light of this history, the feelings of stigma generated in Negro children by attendance at racially isolated schools are realistic and cannot easily be overcome.

Racial Isolation in the Public Schools also presents substantial evidence at pp. 107-108 that integration significantly improves the achievement of Negro children without adversely affecting the educational performance of other children.

Access to a beneficial public educational experience serves as the primary means by which most American children are equipped to survive in their complex technological society. For Negroes, the failure adequately to learn in public school forecloses any possibility that they may take advantage of any of the occupational opportunities

which are just beginning to be made available without regard to race. Escape from the vicious cycle of second-class citizenship begins with equal educational opportunities.

The Fourteenth Amendment is now more than one century old. Political opportunism and stifling constitutional interpretation served to emasculate its reach and thereby subvert its purpose. With the post-World War II decisions of this Court and the passage of new civil rights legislation, however, the original objectives have once again appeared within reach. But the failure of local boards of education to provide equal educational opportunities for Negroes has threatened to forestall full implementation. It is now painfully obvious that local school boards, North and South, will provide an integrated—and therefore equal—educational experience only if compelled to do so. Instead, boards have relied upon compensatory educational programs, administered in racially segregated settings, which have uniformly failed to overcome the disparities that exist between isolated Negro children and their peers.[11] The belief of the court below that "it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students" is therefore an exercise in wishful thinking which leads to constitutional nullification.

Just as after the First Reconstruction, resistance to integration has become a political necessity in virtually every section of the country. Only constitutional interpretation can prevent the continuation and growth of this new and equally virulent form of segregation. For these rea-

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[11] Racial Isolation in the Public Schools, 140, concludes: "The evidence reviewed here strongly suggests that compensatory programs are not likely to succeed in racially and socially isolated school environments."

sons, legal scholars [12] as well as the Fifth Circuit [13] have designated the questions presented by this petition as ones which demand the attention of this Court.

The failure to mandate adequate consideration of the special problems which Negro children face in the public schools—problems caused by the dominant white society through all of its apparatus including myriad governmental agencies—could easily stand as a national disaster resulting from constitutional interpretation second only to that engendered by *Plessy* v. *Ferguson*.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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[12] See Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 40 NYU L. Rev. 285, 307 (1965); Horowitz, Unseparate But Unequal—The Emergency Fourteenth Amendment Issue in Public Education, 13 UCLA L. Rev. 1147, 1154 (1966).

[13] Jefferson I, 372 F. 2d at 879.

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit, December 6, 1966

Before WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

WEICK, Chief Judge. The suit in the District Court was a class action against the Board of Education of the City of Cincinnati, brought by the parents and next friends of Negro pupils enrolled in the public schools of the city, to enjoin the operation of allegedly racially segregated public schools, to enjoin the construction of new schools on sites which would increase and harden alleged existing patterns of racial segregation, and for declaratory and other relief.

The Board denied that it created, operated or maintained racially segregated schools, and alleged that the only genuine issue in the case was whether it violated the constitutional rights of the plaintiffs by refusing to adopt and enforce an affirmative policy of balancing the races in the Cincinnati Public School System.[1]

[1] On March 9, 1964, after the commencement of the present action, the Board of Education adopted the following policy statement to guide its officers and employees:

"(1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long established neighborhood school plan or the requirement of Section 3313.48 R.C. that schools be located where they will be most convenient for the largest number of students.

"The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Section 3313.48, and the numerous factors which have always been considered in establishing such zone lines as—safety of children, travel distance and capacity of school.

"(2) The Board does not accept the concept of de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such."

The evidence in the case consisted of a number of lengthy stipulations, exhibits, and oral testimony. At the close of plaintiffs' evidence defendants moved for judgment, which motion was taken under advisement by the Court. Defendants presented their entire case except for expert testimony. The Court then granted defendant's motion for judgment without considering the evidence offered by the defendants. He handed down an opinion which he adopted as findings of fact and conclusions of law under Rules 41(b) and 52(a), Fed.R.Civ.Proc.[2] In essence, the Court held that there was no constitutional duty incumbent upon the Board to balance the races in the public school system, and that there was a failure of proof on the part of the plaintiffs to establish a policy of segregation or gerrymandering on the part of the Board.

WAS THERE A CONSTITUTIONAL DUTY ON THE PART OF THE BOARD TO BALANCE THE RACES IN THE CINCINNATI PUBLIC SCHOOLS WHERE THE IMBALANCE WAS NOT CAUSED BY ANY ACT OF DISCRIMINATION ON ITS PART?

At the outset it should be pointed out that the State of Ohio abolished segregation in the public schools on February 22, 1887, which was more than 67 years before the United States Supreme Court barred it on constitutional grounds in the momentous decision of *Brown* v. *Board of Education*, 347 U.S. 483 (1954).[3]

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[2] *Deal* v. *Cincinnati Board of Education*, 244 F.Supp. 572 (S.D. Ohio 1965).

[3] 84 Ohio Laws 34, enacted Feb. 22, 1887. The Supreme Court of Ohio upheld and enforced the law in the following year, *Board of Education* v. *State*, 45 Ohio St. 555, 16 N.E. 373 (1888).

The Cincinnati school system discontinued compulsory segregation promptly after the enactment of this Ohio Statute in 1887. Since that time Negro students have had the opportunity to attend the neighborhood schools in Cincinnati on the same basis as white students living in the same localities.

The so-called neighborhood plan for the location of public schools is authorized by statute under which Ohio School Boards are required to—

> "... provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be convenient for the attendance of the largest number thereof." Ohio Rev. Code § 3313.48.

We think the legislature had the power to enact this statute. The Cincinnati Board of Education has complied with it.

Appellants contend that the maintenance of a public school system in which racial imbalance exists is a violation of their constitutional right to the equal protection of the law. They assert that because the Negro student population is not spread uniformly throughout the Cincinnati school system, without a showing of deliberate discrimination or even racial classification, there is a duty of constitutional dimensions imposed on the school officials to eliminate the imbalance. Appellants claim that it is harmful to Negro children to attend a racially imbalanced school and this fact alone deprives them of equal educational opportunity.

The essence of the *Brown* decision was that the Fourteenth Amendment does not allow the state to classify its citizens differently solely because of their race. While the detrimental impact of compulsory segregation on the children of the minority race was referred to by the Court, it was not indispensable to the decision. Rather, the Court held that segregation of the races was an arbitrary exercise of governmental power inconsistent with the requirements of the Constitution.

A finding of educational or other harm is not essential to strike down enforced segregation. This is shown by

many subsequent cases nullifying separate facilities of all kinds with no evidence of harm.

In summarizing this principle, the Court said that classifications based on race violate the Fourteenth Amendment because they are obviously invidious and irrelevant. *Goss* v. *Board of Education,* 363 U.S. 683, 687 (1963).

Thus it is not necessary that a victim of racial discrimination prove that he was harmed in any specific material sense in order to invalidate state-imposed racial distinctions. See *Johnson* v. *Virginia,* 373 U.S. 61 (1963) (seating in courtrooms); *Watson* v. *Memphis,* 373 U.S. 526 (1963) (municipal parks); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961) (restaurants in public buildings); *Dawson* v. *Mayor and City Council of Baltimore,* 220 F.2d 386 (4th Cir. 1955) aff'd 350 U.S. 877 (1955) (public beaches and bathhouses).

In *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), which is a companion case to *Brown,* and which involved the validity of school segregation in the District of Columbia, the Court held that the Fifth Amendment was violated. The Court emphasized that it was the fact of discriminatory classification by the government that violated the Constitution, and looked no further for evidence of educational or psychological injury, saying—

> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling* v. *Sharpe, supra,* at 499.

The principle thus established in our law is that the state may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. Since it is freedom of choice that is to be protected, it is not necessary that any particular harm be established if it is shown that the range of individual options has been constricted without the

high degree of justification which the Constitution requires. It is harm enough that a citizen is arbitrarily denied choices open to his fellows.

Conversely, a showing of harm alone is not enough to invoke the remedial powers of the law. If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution. If factors outside the schools operate to deprive some children of some of the existing choices, the school board is certainly not responsible therefor.

Appellants, however, argue that the state must take affirmative steps to balance the schools to counteract the variety of private pressures that now operate to restrict the range of choices presented to each school child. Such a theory of constitutional duty would destroy the well-settled principle that the Fourteenth Amendment governs only state action. Under such a theory, all action would be state action, either because the state itself had moved directly, or because some private person had acted and thereby created the supposed duty of the state to counteract any consequences.

The standard to be applied is "equal educational opportunity". The Court in *Brown* cast its decision thus because it recognized that it was both unnecessary and impossible to require that each child come through the complex process of modern education with the same end result. This approach grants due respect for the unavoidable consequences of variations in individual ability, home environment, economic circumstances, and occupational aspirations. Equal opportunity requires that each child start the race without arbitrary official handicaps; it does not require that each shall finish in the same time.

Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements

of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral easily determined standards, and better home-school communication. The Supreme Court in *Brown* recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case. *Brown* v. *Board of Education,* 347 U.S. 483, 495 note 13, question 4(a); *Brown* v. *Board of Education,* 349 U.S. 294, 300-01 (1955). But see *Blocker* v. *Board of Education of Manhasset,* 226 F.Supp. 208, 221-222 (E.D.N.Y. 1964).

Because of factors in the private housing market, disparities in job opportunities, and other outside influences, (as well as positive free choice by some Negroes), the imposition of the neighborhood concept on existing residential patterns in Cincinnati creates some schools which are predominantly or wholly of one race or another. Appellants insist that this situation, whieh they concede is not the case in every school in Cincinnati, presents the same separation and hence the same constitutional violation condemned in *Brown.* We do not accept this contention. The element of inequality in *Brown* was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race. The evil inherent in such a classification is that it fails to recognize the high value which our society places on individual worth and personal achievement. Instead, a racial characterization treats men in the mass and is unrelated to legitimate gov-

ernmental considerations. It fails to recognize each man as a unique member of society.

In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situation is far removed from *Brown*, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice.[4] We read *Brown* as prohibiting only enforced segregation.

The School Board, in the operation of the public schools, acts in much the same manner as an administrative agency exercising its accumulated technical expertise in formulating policy after balancing all legitimate conflicting interests. If that policy is one conceived without bias and administered

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[4] The District Court correctly excluded evidence of alleged discrimination in the public and private housing markets. Such discrimination is caused, if in fact it does exist, by persons who are not parties to this case and the Board has no power to rectify that situation. If appellants have any valid claim for infringement of their rights by public housing or urban renewal officials, they may obtain appropriate relief against them under the Fourteenth Amendment. With respect to private actions amounting to discriminatory practice, while there is no federal constitutional right available to appellants, they may seek relief from the state Civil Rights Commission or in the state courts, if relief is denied, under the provisions of the Ohio Fair Housing Law. Ohio Rev. Code § 4112.01-07.

uniformly to all who fall within its jurisdiction, the courts should be extremely wary of imposing their own judgment on those who have the technical knowledge and operating responsibility for the educational system. Thus, whereas such a geographical principle might be totally unacceptable in the administration of facilities such as beaches parks, restaurants, or golf courses (see desegregation cases cited above), the school system presents problems of an altogether different nature and the fair minded judgment of the school officials is entitled to full consideration in determining whether freedom of choice has been preserved for the children within the limits necessary for effective educational practice. See *Watson* v. *Memphis, supra,* at 531-532.

We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose.

The bussing of pupils away from the neighborhoods of their residences may create many special problems for boards of education. These include the providing of adequate transportation and proper facilities and personnel for the supervision, education and well being of *all* pupils. All of this must be accomplished within the Board's budget.

Although boards of education have no constitutional obligation to relieve against racial imbalance which they did not cause or create, it has been held that it is not unconstitutional for them to consider racial factors and take steps to relieve racial imbalance if in their sound judgment such action is the best method of avoiding educational harm. *Balaban* v. *Rubin,* 14 N.Y.2d 193, 199 N.E.2d 375 (1964), *cert. denied* 379 U.S. 881 (1964); *Morean* v. *Board of Education of Montclair,* 42 N.J. 237, 200 A.2d 97 (1964).

> "The tenor of these and related decisions . . . clearly indicates that the Fourteenth Amendment,

> while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system." *Offerman* v. *Nitkowski*, 248 F.Supp. 129, 131 (W.D.N.Y. 1965)

In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to read *Brown* in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice. We are of the view that there may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problems must be preserved. See Freund, *Civil Rights and the Limits of the Law*, 14 Buffalo L.Rev. 199, 205 (1964).

Moreover, our refusal to restrict the school board with a mathematically certain formula for the vindication of individual constitutional rights is not an innovation. The right to a trial by an impartial, fairly selected jury, is well established in our law and it has been protected against the same sort of disguised racial discrimination that has been attempted in the school desegregation cases. *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Ex parte Virginia*, 100 U.S. 339 (1879); *Strauder* v. *West Virginia*, 100 U.S. 303 (1879).

However, it is equally clear that a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which is to try him nor on the venire or jury roll from which petit jurors are

to be chosen. *Swain* v. *Alabama,* 380 U.S. 202, 208 (1965); *Akins* v. *Texas,* 325 U.S. 398, 403 (1945). While the two situations may not be completely analogous, the potential dangers to a criminal defendant forced to face a racially imbalanced jury, are at least as great as the intangible, often speculative injuries threatening a student in a racially imbalanced school. The cases recognize that the calculus of equality is not limited to the single factor of "balanced schools"; rather, freedom of choice under the Fourteenth Amendment is a function of many variables which may be manipulated differently to achieve the same result in different contexts.

If the separation in imbalanced schools is the result of racial discrimination, the officials must take steps to remedy the situation. However, the Constitution does not prescribe any single particular cure, and the mere fact of imbalance alone is not a deprivation of equality in the absence of discrimination.

Two other Circuits have considered this question and have come to the same conclusion. *Downs* v. *Board of Education of Kansas City,* 336 F.2d 988 (10th Cir., 1964), *cert. denied* 380 U.S. 914 (1965); *Bell* v. *School, City of Gary,* 324 F.2d 209 (7th Cir. 1963), *cert. denied* 377 U.S. 924 (1964). See also *Springfield School Comm.* v. *Barksdale,* 348 F.2d 261, 264 (1st Cir. 1965).

Appellants rely on several decisions which they contend establish the constitutional invalidity of imbalanced schools. However, it would seem that these cases do not go that far. In each of them there was an added element which transmuted mere separation into segregation, difference into discrimination. This is in accord with our holding that bare statistical imbalance alone is not forbidden. There must also be present a quantum of official discrimination in order to invoke the protection of the Fourteenth Amendment.

In *Taylor* v. *Board of Education of City School Dist. of New Rochelle,* 294 F.2d 36 (2nd Cir. 1961), *cert. denied*

368 U.S. 940 (1961), the Court of Appeals characterized as "crucial" the District Court's finding that the defendant School Board has deliberately created and maintained a segregated school, saying at page 39:

> "In short, race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school."

This situation, where affirmative gerrymandering of school districts had been accomplished and maintained with the motive of separating the races, was found to go "beyond *mere* imbalance" (emphasis added). This latter language clearly indicates that the Court's theory was one of "imbalance plus". See also Kaplan, *Segregation, Litigation and the Schools: The New Rochelle Experience*, 58 Nw. U.L.Rev. 1 (1963).

Appellants place much emphasis on *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F.Supp. 971 (W.D. Okla. 1965), but we are unable to adapt that case to the problem of racial imbalance. Despite appellants' assertion that the District Court in *Dowell* dealt with facts similar to those in the case before us, it is clear that it did not. In that case the problem was one of initial desegregation of a school system which had previously been organized along the dual racial lines condemned by *Brown*. The Court was explicit in this respect:

> "This case does not raise issues regarding a school board's constitutional duty to correct racial imbalance in localities where there is no prior history of segregation, or where prior racial policies are deemed corrected." (pp. 980-981)

Further, it is clear that the duty of a school board in first imposing a neighborhood districting system where none was used before, is different from that where the system has been used for many years and the imbalance

in the schools is the result of population mobility among the various neighborhoods. In *Dowell,* the Court noted that the relative immobility of the Negro residents was used by the school board in separating them through the neighborhood policy, while in Cincinnati one of the primary causes of imbalance has been the rapid movement of the Negro population into different areas of the city. Thus, the problem in *Dowell* was far closer to the gerrymandering in *Taylor* than to anything in the classic statistical imbalance cases in northern cities.

Finally, in the one case in which a district Court apparently accepted the appellants' theory of racial imbalance, *Barksdale* v. *Springfield School Comm.*, 237 F.Supp. 543 (D. Mass. 1965), the First Circuit, in vacating the decision and dismissing the complaint without prejudice specifically rejected any such asserted constitutional right. *Springfield School Comm.* v. *Barksdale,* 348 F.2d 261, 264 (1st Cir. 1965).

Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools. They must also expose that added quantum of discriminatory state action which deprives them of their constitutional right to freedom of choice. If the school officials, through overt practice or by subterfuge, have treated students differently solely because of race, then they not only must cease doing so, but also must take affirmative action to remedy the condition which they have caused. Thus, even if the Negro students were distributed uniformly in the schools, if other forms of discrimination were used against them they would still be entitled to the aid of the law. When no discrimination is shown, racial imbalance alone is no warrant for relief.

DID THE BOARD OF EDUCATION INTENTIONALLY CAUSE RACIAL IMBALANCE IN THE CINCINNATI PUBLIC SCHOOLS, DEPRIVE NEGRO CHILDREN OF EQUAL EDUCATIONAL OPPORTUNITIES, AND DISCRIMINATE AGAINST NEGROES IN THE HIRING AND ASSIGNMENT OF TEACHERS?

In their "Statement of Questions Involved" appellants assert that they have sufficiently shown that the Board of Education has *intentionally* caused, and then failed to eliminate, serious racial imbalance in the Cincinnati public schools, has afforded Negro children who are confined to segregated schools, inferior educational programs and facilities, and has provided school faculties and personnel which reflect the racial patterns of students. They state that children who attend racially imbalanced schools suffer injury constituting a denial of equal educational opportunity.

The findings of fact of the District Court assume significance in our review of this phase of the case. Under Rule 52(a) the court was required to find the facts specially. The findings should be both "comprehensive and pertinent to the issues to provide a basis for decision." *Schilling* v. *Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir. 1944); *Shapiro* v. *Rubens*, 166 F.2d 659 (7th Cir. 1948). In meeting this standard, the District Courts are not required to prepare elaborate findings on every possible issue or contention raised at trial. However, there must be subsidiary findings to support the ultimate conclusions of the court. *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 420 (1943); *Dearborn Nat'l Cas. Co.* v. *Consumers Petroleum Co.*, 164 F.2d 332, 333 (7th Cir. 1947). See also *Townsend* v. *Benamente*, 339 F.2d 421 (9th Cir. 1964). But see *Gay Games, Inc.* v. *Smith*, 132 F.2d 930, 931 (7th Cir. 1943).

At the trial level this case confronted the District Court with an enormous amount of evidence in the form of

detailed maps, charts, statistical tables, sociological studies, and historical accounts, in addition to a substantial amount of oral testimony, expert and otherwise. To his credit, the District Judge succeeded to a great degree in expediting the trial through the extensive use of many stipulations and effective pre-trial procedures, which sharpened the issues. However, in his opinion he adopted as fair the following statement taken verbatim from the School Board's brief:

> "The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended entirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply a result of the racial composition of the neighborhoods which they serve."

Then, after discussing the issue of imbalance, he stated:

> "Their [appellants'] failure to produce evidence to establish a policy of segregation or gerrymandering on the part of defendants strongly suggests that such practices have not been engaged in. It is here found that plaintiffs have failed to establish a deprivation of rights under the law or under the Constitution of the United States by the requisite degree of proof . . ."

In dealing with the issue of discrimination in the context of a great metropolitan educational complex, these general findings do not present an adequate basis for review by this Court.

The District Court's finding on the racial composition of the schools in Cincinnati reveals that the schools are indeed racially imbalanced. In other words, the Negro student population is not spread uniformly among the indi-

vidual schools, mainly because of the operation of the neighborhood school policy in conjunction with the residential concentration of Negroes in some areas. As the District Court held, and we affirmed above, this fact by itself gives rise to no relief. However, the crucial fact to be found is whether the racial imbalance was intentionally caused by gerrymandering or by other alleged discriminatory practices on the part of the Board. On that point the District Judge said only that appellants had failed to produce evidence to establish gerrymandering or other discriminatory practice and that this failure strongly suggested that such practices did not exist. Such a general finding must be supported by subsidiary findings of fact. *Kelley* v. *Everglades Drainage District, supra.*

Appellants, through extensive use of discovery techniques, adduced vast quantities of information concerning matters such as alleged discrimination in school attendance zoning, transportation policies, teacher selection and assignment, comparative test results, and policies on transfers and overcrowding of students. Some of their contentions with respect thereto are answered by appellees on appeal here, but some are not. This is due partly to the truncated status of the case at the time of the District Court's decision on the motion to dismiss, and partly because the Court considered only appellants', and not the School Board's, evidence in ruling on the motion.

An example of such unanswered and unaccounted for situations is the districting of the Sawyer Junior High School where the enrollment is mostly Negro. The fact is that its boundaries exclude children who live across the street from it in a largely white neighborhood. The School Board in its brief offered no explanation for this situation or for the selection of the Sawyer site so close to the existing Withrow Junior High School.

We have stated above that a showing of impairment of a Negro student's capacity to learn, arising from his

school's racial imbalance, does not, standing alone, make out a case of constitutional deprivation. Evidence of such harm, however, may indeed be relevant to the issues of the case before us. Appellants offered expert evidence on this subject. The School Board offered no opposing expert testimony, no doubt because the Court granted the Board's motion to dismiss, made at the close of plaintiffs' proofs. Our review would be helped by a finding as to whether the District Judge considered plaintiffs' expert testimony of such revelance, weight or probative value as to make an issue calling for rebuttal proof by defendant.

No findings were made on these disputed issues. Without findings we are unable to determine whether discrimination existed with respect to specific schools and programs.

Other errors have been asserted which, in the light of our other holdings, we deem insubstantial.

The judgment of the District Court is affirmed on the issue of racial imbalance not intentionally caused by the Board, and the case is remanded for further findings on the issues of claimed discrimination in specific schools and programs and claimed harm to Negro students, allegedly caused by racially imbalanced schools, and for the taking of such additional relevant evidence as either party may offer. *Northcross* v. *Board of Education of Memphis*, 333 F.2d 661, 663-664 (6th Cir. 1964).

SUPREME COURT, U. S. No. 4956
JUN 5 1967
JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term 1967

TINA DEAL, a minor, by FRANK L. DEAL, her father and next friend, et al.,

Petitioners,

vs.

THE CINCINNATI BOARD OF EDUCATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

Supreme Court of the United States

October Term 1966

No. 1358

TINA DEAL, a minor, by FRANK L. DEAL, her father and next friend, et al.,

Petitioners,

vs.

THE CINCINNATI BOARD OF EDUCATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTION

This cause is not ripe for appeal because it has been remanded to the United States District Court for the Southern District of Ohio, Western Division, for further proceedings which could make for question raised through this petition a moot question. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is not in conflict with other circuits.

QUESTIONS PRESENTED

1. Is there a constitutional duty on Cincinnati Public School officials to balance the racial composition of the Cincinnati Public Schools because the Negro pupil popu-

lation is not uniformly distributed throughout the Cincinnati Public School System, when there is no showing of deliberate discrimination or racial classification?

2. Should the United States Supreme Court consider question No. 1 while the cause is on remand from the Court of Appeals to the District Court for proceedings to determine whether or not the Cincinnati Public Schools have brought about racial imbalance through gerrymandering, have deprived Negro children of equal educational opportunities, or have discriminated against Negroes in the hiring and assignment of teachers?

STATEMENT

The record in this case is voluminous. It includes a lengthy printed stipulation, 286 joint documentary exhibits, and 777 pages of transcript. It nonetheless can be summarized in two paragraphs:

(1) The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended entirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply the result of the racial composition of the neighborhoods which they serve.

(2) A professor of education from Antioch College and a professor of Sociology from Washington University, St. Louis, both expressed the opinion that "a racially unbalanced school seriously affects a child's ability to learn."

The record is clear that there has been an irregular shift of populations in Cincinnati in recent years. This has caused many predominently white and racially balanced schools to become all Negro in a period of two or three

years, even though the school attendance boundry lines remained substantially unchanged.

The District Court made a finding that there was insufficient evidence to show that racial imbalance in some of the schools was caused by unlawful action of the respondents. The District Court failed to make findings on the question of educational harm and discriminatory practices with regard to the employment and assignment of teachers. The case was remanded to the District Court for further proceedings on the question of whether or not unlawful action of the respondents caused the present racial composition of the Cincinnati Public Schools, on the question of educational harm, and on the question of discriminatory practices in the employment and assignment of teachers.

The United States Court of Appeals decided that if there were no concurrent unlawful action on the part of the Cincinnati Public Schools, the mere fact alone that some schools were predominantly Negro does not create a constitutional duty to balance the races.

The record is clear that in the seventy-eight years since segregation was abolished in Ohio in 1887 [84 *Ohio Laws* 34; *Board of Education* v. *State,* 45 Ohio St. 555, 16 N.E. 373 (1888)] Negro students have attended the neighborhood schools in Cincinnati on the same basis as white students. The Cincinnati Public Schools have always operated under what is commonly referred to as the "neighborhood plan," which is provided for by the *Ohio Revised Code,* Sec. 3313.48, which provides:

> "The board of education of each city, exempted village, and local school district shall provide for the free education of the youth of school age within the district under its jurisdiction, *at such places as will be most convenient for the attendance of the largest number thereof.*" (emphasis supplied)

The Cincinnati Board of Education considered the question of racial imbalance and adopted a policy with regard to racial imbalance as enumerated in stipulation 11:

> 11. *Defendants' policy statement*: On the 9th day of March, 1964, the defendants agreed to a policy as a guide to officers and employees of the Board in selection of sites for schools, establishment of attendance area boundary lines and assignment of pupils. This policy is as follows:
>
> (1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long-established neighborhood school plan or the requirements of Sec. 3313.48 R.C. that schools be located where they will be most convenient for the largest number of students.
>
> The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Sec. 3313.48, and the numerous factors which have always been considered in establishing such zone lines — safety of children, travel distance and capacity of schools.
>
> (2) The Board does not accept the concept of de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such.

ARGUMENT

1. Is there a Constitutional Duty on Cincinnati Public School Officials to Balance the Racial Composition of the Cincinnati Public Schools Because the Negro Pupil Population Is Not Uniformly Distributed throughout the Cincinnati Public School System, Where There Is No Showing of Deliberate Discrimination or Racial Classification?

The United States Court of Appeals made reference to *Cross* v. *Board of Education,* 373 U.S. 683, 687 (1963), and based its analysis upon the premise that a racial classification as such is "obviously irrelevant and invidious" and thus is unlawful. The showing of a racial classification would not require a showing of harm in order to sustain the remedy under the United States Constitution.

With the foregoing premise, the Court of Appeals joined every other Court of Appeals that has considered the problem of so-called *de facto* segregation and agreed that a neighborhood school policy conscientiously administered without manipulation to deliberately separate students of different races, does not constitute the violation of the constitutional rights of students, even though some schools in a school system which follows a neighborhood school policy may have pupil populations entirely composed of students of one race or the other. *Bell* v. *School City of Gary, Ind.,* 324 F.2d 209 (CCA 7th, 1963), cert. den. 377 U.S. 924, 84 S. Ct. 1223, 12 L. Ed.2d 1216; *Downs* v. *Board of Education of Kansas City,* 336 F.2d 988 (CCA 10th, 1964). In Brown II, the constitutionality of the neighborhood policy was adverted to as follows:

> To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and at-

> tendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis and revision of local laws and regulations which may be necessary in solving the foregoing problems. *Brown* v. *Board of Education*, 349 U.S. 294, 300-301.

A number of other courts have arrived at the same conclusion as the Sixth Circuit:

Lynch v. *Kenston School District*, 229 F. Supp. 740 (N.D. Ohio 1964), app. dismissed July 2, 1965; *Craggett* v. *Board of Education of Cleveland*, 234 F. Supp. 381, 386 (N.D. Ohio 1964); *Avery* v. *Wichita Falls Independent School District*, 241 F.2d 230, 233 (CCA 5th, 1957); *Boson* v. *Rippy*, 285 F.2d 43, 45-46 (CCA 5th, 1960); *Kelly* v. *Board of Education of the City of Nashville*, 270 F.2d 209, 226 (CCA 6th); *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (EDSC, 1955).

There is tremendous pressure to push the 14th Amendment into areas that properly should be the subject of legislation and administrative action. This problem was confronted by Professor Paul A. Freund of the Harvard Law School in his article "Civil Rights and the Limits of Law," 14 *Buffalo L. Rev.* 199 (1964). Professor Freund made reference to the rejection of efforts to push the Fourteenth Amendment further in the involvement in public accommodations, and wrote in part:

> Those who argue that the Fourteenth Amendment, in and of itself, applies or should apply to the places of public accommodation do so partly because they see in the Fourteenth Amendment the most appropriate source of moral strength. But I believe they overlook some institutional considerations of importance. If we were to use the Fourteenth Amendment directly without the intervention of an act of Congress, as some members of the Court wished to do last June,

there would have been all kinds of unresolved questions of the range of application of the Fourteenth Amendment: not merely in racial discrimination, for the Fourteenth Amendment is far broader than that, but in other forms of equal protection, nepotism in business, for example, in the concept of due process of law applied, for instance, to the conduct of stockholder meetings, or labor union meetings. All of these would potentially be Federal Constitutional questions to be resolved by authoritative decisions overrulable by constitutional amendment, but surely lacking in that sense of tentativeness, of experimentation, of progressivism, of flexibility, that are the hallmarks of statutory or common law development as distinguished from constitutional adjudication. And so I for one welcome the fact that the Court did not see fit last June to decide the cases on sit-ins in places of public accommodation on grounds of the Fourteenth Amendment per se. The choice of institutional means pointed in the direction of the more flexible and ad hoc approach. 14 *Buffalo L. Rev.* 199, 203-204.

He extended this analysis to the problem of so-called "de facto" segregation and urged the courts not to get involved in the creation of affirmative programs to balance races through constitutional law:

Still a legislature or a school board ought to be able to take account of the facts of segregation in the interest of promoting long-run *de facto* desegregation, which is surely a legitimate aim. This is the position taken by both the New York Court of Appeals and the New Jersey Supreme Court, there being no issue in the case of requiring integration constitutionally but only of *permitting the race factor to be taken into account by a school board disposed to do so,* without violating the abstract principle of color-blindness. This is a question of *educational and social policy,* a *choice of means to a legitimate end,* the encouragement of desegregation, as segregation itself would be an illegiti-

> mate end. There the matter rests, and in my judgment, is likely to rest so far as constitutional law is concerned. 14 *Buffalo L. Rev.* 199, 205. (Emphasis added)

The petitioners claim that the decision of the Sixth Circuit is in conflict with other circuits. This assertion is not sustained by an examination of the opinions they cite. They place heavy reliance upon the case of *United States* v. *Jefferson County Board of Education,* 372 F.2d 836 (CCA 5th, 1966). This case is clearly not in conflict with the decisions on *de facto* segregation because the United States Court of Appeals for the Fifth Circuit states forthrightly:

> In this circuit, the school problem arises from state action. This circuit has not had to deal with non-racially motivated *de facto* segregation, that is, racial imbalance resulting fortuitously in a school system based on a single neighborhood school serving all white and Negro children in a certain attendance area or neighborhood. 372 F.2d 836, 852.

The same fact is true in regard to *Board of Education* v. *Dowell,* — F.2d — (CCA 10th, 1967).

The petitioners also rely upon the decision of the First Circuit in *Springfield School Committee* v. *Barksdale,* 348 F. (2d) 261 (CAA 1, 1965) to show conflict among the circuits. The specific holding of this case was that the judgment of the district court was premature because it failed to allow the administrative body concerned (Springfield School Committee) to deal with the racial composition of the schools in accordance with an announced policy to minimize the amount of racial separation in the school system. This decision did not compel the balancing of races in the absence of the showing of state action to cause the separation of races. Indeed, the First Circuit reversed such an order issued by the district court. In essence, the

First Circuit agreed with Professor Freund's analysis that the problem of racial imbalance in the public schools should be left to the trial and error procedures of legislation and administrative decision-making.

There is no United States Circuit Court which has held that racial imbalance caused by forces completely outside the control of the school board in a large northern city imposes a constitutional duty upon the school board to balance the races within the school system. Thus, there is no conflict among the circuit courts with regard to the holding of the Sixth Circuit in this case.

2. Should the United States Supreme Court Consider Question No. 1 While the Cause Is on Remand from the Court of Appeals to the District Court for Proceedings to Determine Whether or Not the Cincinnati Public Schools Have Brought About Racial Imbalance through Gerrymandering, Have Deprived Negro Children of Equal Educational Opportunities, or Have Discriminated against Negroes in the Hiring and Assignment of Teachers?

This case is not now ripe for review because it has been remanded to the District Court for further proceedings which may make moot the question raised by the petitioners. The Court of Appeals found that the District Court's findings of fact were not sufficient to support its conclusion that the plaintiffs failed to sustain their burden of proof with regard to intentional action to cause racial imbalance, such as gerrymandering, deprivation of equal educational opportunities, and discrimination in the hiring and assignment of teachers. For this reason the case has been remanded to the District Court for further proceedings on these issues. The petitioners make reference to the statement of the Court of Appeals contained in 15a-16a of the petitioners' petition:

> We have stated above that a showing of impairment of a Negro student's capacity to learn, arising from his school's racial imbalance, does not, standing alone, make out a case of constitutional deprivation. Evidence of such harm, however, may indeed be relevant to the issues of the case before us. Appellants offered expert evidence on this subject. The School Board offered no opposing expert testimony, no doubt because the Court granted the Board's motion to dismiss, made at the close of plaintiffs' proofs. Our review would be helped by finding as to whether the District Judge considered plaintiffs' expert testimony of such relevance, weight or probative value as to make an issue calling for rebuttal proof by defendant.

Since this matter of impairment of the student's ability to learn has been remanded to the district court for further proceedings, contrary to the assertions of petitioners at pages 10-13 of their petition, this issue would be subject to further review by the Sixth Circuit Court of Appeals and subject to a later Petition for a Writ of Certiorari.

If this Writ of Certiorari were granted, the United States Supreme Court would be asked to hold, contrary to those circuit courts which have considered the question, that there is a constitutional duty to balance races in those situations where a racial imbalance has arisen as the result of factors not under the control of a school board, without a determination of whether or not there has been gerrymandering, without a determintaion of whether or not there has been educational harm, and without a determination as to whether or not there has been discrimination against Negroes in the hiring and assignment of teachers. This petition is made even though a determination of the issues that have not yet been determined in this case might make this question moot.

CONCLUSION

Wherefore, the respondents request that the petition for a writ of certiorari be overruled.

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APPENDIX

In the

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL ACTION NO. 5483

TINA DEAL, a minor, by Frank L. Deal, her father and next friend, et al.

Plaintiffs

v.

THE CINCINNATI BOARD OF EDUCATION, et al.

Defendants

OPINION

(Filed July 26, 1965)

Robert L. Carter, Barbara A. Morris, Lewis M. Steel, New York City, Norris Muldrow, Calvin C. Johnson, Cincinnati, Ohio, for plaintiffs.

William A. McClain, City Sol., Philip S. Olinger, Asst. City Sol., C. R. Beirne, Special Counsel for Cincinnati Board of Education, Robert E. Manley, Cincinnati, Ohio, for defendants.

PECK, J.: This is a class action brought by Negro children through their parents and next friends complaining of alleged racial imbalance in Cincinnati public schools.

After repeated informal and pretrial conferences between the Court and counsel, numerous hearings on preliminary motions (including one for summary judgment), and unusually exhaustive discovery procedures, this case came on for trial. Prior thereto plaintiffs had been unsure as to which experts they would call and what areas would be covered by their testimony and trial was entered into under an agreement providing that plaintiffs would present their entire case, defendants would present their entire case except for responsive expert testimony, whereupon trial would be continued to an agreed date at which later time defendants' experts' testimony and plaintiffs' rebuttal would be received.

At the conclusion of plaintiffs' case, defendants moved for judgment, and it is that motion which is presently under consideration. Upon its making, the motion was extensively argued orally, and has since been thoroughly briefed by counsel. Subsequent to that oral argument, and in accordance with the previous agreement, defendants presented their "factual" case (i.e., their entire case except for expert testimony), but nothing contained therein is before the Court for purposes of the present motion and will not hereinafter be taken into account.

The Amended Complaint lists as plaintiffs 96 (including 52 intervenors) "minor citizens of the State of Ohio," suing through their parents and next friends "on their own behalf and on behalf of thousands of [other] Negro minors within the school district of Cincinnati, who are similarly situated because of race and color." The Cincinnati Board of Education, its superintendent and the individual members of the Board are named defendants. For present purposes, the eleven paragraphs of the prayer of the Amended Complaint may be fairly summarized by setting forth one of them:

"(3) That defendants be further enjoined from operating and providing racially segregated public schools, assigning plaintiffs, and the members of the class they represent, to racially segregated schools, and seeking to further extend existing patterns of racial segregation."

The Amended Answer to the Amended Complaint permitted to be filed over plaintiffs' objections at trial (Transcript of Proceedings [hereinafter designated by "T."] 5-6; T. 325) "generally" denies the essential allegations of the Amended Complaint, specifically denies that plaintiffs have suffered damage, injury or irreparable harm or that they have any real interest in this action, and avers that the "real party in interest is the National Association for the Advancement of Colored People, which is responsible for the commencement of this action and has maintained and controlled it on behalf of the plaintiffs since its commencement[1];" denies any "good faith" effort to negotiate the

---

[1] The record of appearances of counsel indicates that the only attorneys initially involved on the part of plaintiffs were those resident in Cincinnati (Messrs. Muldrow and Johnson). Subsequently Miss Barbara A. Morris of New York City entered an appearance on behalf of plaintiffs and participated in some preliminary matters but not at trial, and Messrs. Carter and Steel of New York City entered appearances and participated at trial with Mr. Muldrow. The following colloquy concerning representation occurred (T. 373):

"MR. CARTER: . . . If I might say, I am sorry for the misunderstanding the Court had. We, of course, are counsel for the National Association for the Advancement of Colored People, Mr. Steel and myself, but before this Court at all times we were representing the plaintiffs in this action, and not the organization. I am sorry the Court didn't understand that.

"THE COURT: Mr. Carter, on that subject, on April 9th of this year, Mr. Steel indicated that this case was better prepared, and would be more fully presented because the National Association for the Advancement of Colored People had more personnel and more money available for the preparation of this case than had been true in the preparation of other cases."

Subsequently (T. 374) Mr. Steel stated "As Mr. Carter did indicate,

issues on the part of plaintiffs, while averring such negotiation by defendants; and denies the jurisdictional right of this court to consider the issues presented in this action because of the failure of plaintiffs to exhaust their administrative remedies under Ohio law.

From the time of our earliest contact with this case an earnest effort has been made to elicit from counsel an agreed statement of the issue[s] and to cause the case to be placed in posture for submission by stipulation supplemented by expert testimony.[2] Some indication of the difficulties encountered in attempting to define the issues and eliminate superflous testimony is indicated from the following statement contained in our Memorandum Opin-

---

we naturally are employed by the NAACP, and the NAACP also handles other cases, so that I am — the attorneys for the NAACP are also attorneys for plaintiffs in other cases."

It seems proper to add that on the other side of the table the City Solicitor of Cincinnati, who personally participated throughout the proceedings, found it necessary to secure additional attorneys to aid him and his assistants in defending the action. C. R. Beirne, who acted as chief trial counsel for the defendants, and Robert E. Manley were employed for this purpose.

The net result has been that the Court has had the benefit of an unusually thorough presentation: e.g., the briefs for and against the present motion alone total 101 pages without appendices.

[2] Receipt of such testimony was vigorously resisted by defendants, and while expert testimony has been received in other cases of this nature (See, e.g., *Northcross* v. *Board of Education*, 333 F.2d 661 (6th Cir. 1964), cert. denied, 370 U.S. 944 (1964); *Kelley* v. *Board of Education*, 270 F.2d 209 (6th Cir. 1959), cert. denied, 361 U.S. 924 (1959); *Dowell* v. *School Board*, 219 F. Supp. 427 (W.D. Okla. 1963); *Blocker* v. *Board of Education*, 226 F. Supp. 208 (E.D. N.Y. 1964); *Barksdale* v. *Springfield School Committee*, 237 F. Supp. 543 (D.C. Mass.), rev'd. —— F.2d —— (1st Cir. 1965); *Bell* v. *School City of Gary, Indiana*, 213 F. Supp. 819 (N.D. Ind.), aff'd, 324 F.2d 209 (7th Cir), cert. denied, 377 U.S. 924 (1963)), no reported case indicates such an objection or the ruling thereon. In the absence of controlling authority, the Court here took the position throughout that objection to such testimony went rather to the weight than to the admissibility of the testimony (e.g., T. 318, 322, 325 and 352), and overruled the objections.

ion filed March 9th, 1965, disposing of defendants' Motion for Summary Judgment:

> "[T]he motion will be overruled on the narrow ground that defendants have failed to establish that there is no genuine issue as to any material fact which can be satisfactorily isolated from the whole of the rambling, rhetorical Amended Complaint.
>
> "This is not to say, however, that we are in agreement with plaintiffs' further argument that this conglomeration of allegations constitutes a 'one-count' cause of action. We cannot agree with this because in spite of the many, many hours that have been spent in hearings, conferences with counsel and in reviewing the myriad pleadings, motions, answers to interrogatories, objections, exceptions, depositions and exhibits (with an aggregate bulk of many pounds) we have yet to be advised as to what that 'one-count' is. A comment from our Memorandum Opinion of August 4th, 1964, is as appropriate now as it was then:
>
> > " 'As a matter of fact, even at this late date in this action which has consumed countless hours of the time of all concerned the issues continue to be clouded and obscure.'
>
> "In view of the proximity of the pretrial conference, it seems pointless to here comment further on the difficulties which have been encountered in attempting to get this cause squarely at issue. Counsel have been asked time after time what single fact in this entire matter is not readily capable of stipulation, but no affirmative response has ever been made."

Monumental effort on the part of counsel did, in fact, result in great progress in the area of stipulation, and at the time of the pretrial conference April 9, 1965, it appeared probable that the entire factual presentation could be so presented. However, counsel for plaintiffs then advised that in addition to the stipulations and expert

testimony, they proposed to call the individual defendants and various employees of the Board of Education as on cross-examinaton. We immediately advised that while no doubt existed as to their right (as distinguished from advisability of doing so) to call parties as on cross-examination, in the absence of clear authority employees other than managing agents could not be so called.[3] At that conference we ineffectively suggested that from plaintiffs' point of view stipulations could not reasonably be expected to be strengthened by cross-examinations of the Board's members and its superintendent, and that explanations weakening the stipulations might well be forthcoming. Parenthetically, we offer the comment that the latter did in fact occur.

The question of the right of plaintiffs to call Board employees not parties hereto as on cross-examination was raised squarely when plaintiffs called one John Shreve (then not otherwise identified). The record reflects the following (T. 217B-219):

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[3] T. 255-257 "THE COURT: It will be sustained.

"Mr. Steel, in view of your indication of surprise, and the Court's ruling yesterday, it might be helpful to recall to counsel's mind the pretrial conference held on April 19th. At that time I said to you and Mr. Muldrow, 'I would like to whatever extent we can get this cross-examination thing clear.

" 'I recognize of course there is no question about the right to call parties on cross-examination, but included in the draft of the pretrial statement that went out was a statement that only those witnesses would be called on cross-examination whom you had a right to so call, and it raises a legal point.

" 'As a general rule where you have a corporate defendant only a person in a managing capacity can be called as on cross-examination. How that rule applies to a public entity I do not know. My very, very frank feeling is that the rule should be much more narrowly construed as to a public entity because of the nature of the people involved.

" 'You are talking here about public servants who are not employees of a corporation for profit, and I do not think that the personnel of a board of education in the absence of some pretty clear authority

"JOHN SHREVE

"called as a witness by Plaintiffs, being first duly sworn, was examined and testified as follows:

"MR. STEEL: Your Honor, I call Mr. Shreve as an adverse witness under Rule 43 (b).

"THE COURT: That will be denied.

"MR. STEEL: Excuse me, Your Honor.

"THE COURT: That request will be denied.

"MR. STEEL: Can I have the basis of that ruling, Your Honor?

"THE COURT: Yes, you may.

"The basis of the ruling is that 43 (b), of the Federal Rules of Civil Procedure, provides that: 'a party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or pri-

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are available for call as on cross-examination. That's what I meant at our session here last time on March 11.'

"Then there were some exchanges in which both yourself and Mr. Muldrow participated, and subsequently, after making reference to Rule 43(b) you said: 'I think the rule is there to make sure that parties have the right to call adverse witnesses —'

"I interrupted to say, 'Mr. Steel, that is exactly the point. These are not adverse witnesses. These are public servants. That is exactly the point.'

" 'MR. STEEL: But they could be expected — they would because of their loyalty and because of their job — to testify in the interest of their employer.'

" 'THE COURT: I will never recognize that. I will never recognize that any public servant can be put in that category. Once you get a showing of hostility that is an entirely different matter. Then you have the right to move to cross-examine on the basis of hostility or surprise. But that is exactly what I was talking about when I said I do not think you can compare a public servant to an employee of a private corporation for profit.'

"Mr. Steel, that's the transcript of that hearing. I submit to you, sir, that it is exactly the same statement, in respect, that I made from this bench yesterday afternoon. I can see no conceivable reason for your claim of surprise in view of that transcript."

vate corporation,' and so forth, as on cross-examination.

"It is the holding of this Court that this witness at this time does not fall within any of the permissive portions of that rule to permit his cross-examination by counsel for the Plaintiff.

"MR. STEEL: Your Honor, I note an objection to that ruling, and urge the arguments that I made in my pretrial brief.

"THE COURT: For the further information of counsel I will make this additional explanation as I did to counsel at the time of the last pretrial conference.

"I would in any event with reference to a private corporation not at this stage of the proceedings, permit the calling of this witness as on cross-examination, on the ground that he is not a managing agent.

"However, I further point out, as I did to counsel on the record in the pre-trial conference that we are here dealing not with persons who are employed in a private capacity, but we are dealing with public servants. I take no offense at being called idealistic, if you care to do that, but I have enough idealism to be absolutely convinced, until the contrary is shown, that public servants are just exactly what is connoted by that term. They are serving the public, not an individual master. When as and if this witness, or any other witness called by any party demonstrates hostility, I need hardly say to you that a motion for the right to cross-examine may be made. And until that time occurs, as indicated, the request will be denied."

Shreve's subsequent testimony established him as an assistant superintendent in the Cincinnati school system in the department of special services. However, plaintiffs had themselves already elicited from Wendell Pierce, Superintendent of Schools, the fact that the responsibility for de-

cisions within the school system was his alone and that such responsibility was neither delegated to nor shared by assistant superintendents (T. 130-131). In fact, under Ohio law a superintendent must so assume full responsibility (O.R.C. § 3319.01), and can neither so delegate nor share. The authorities cited by plaintiffs in contending for their right to cross-examine such witnesses are not in point.[4] Plaintiffs then further preserved their record on this point by offering to call three other specified assistant superintendents as "adverse witnesses under Rule 43 (b)" and taking exceptions to the denial of such right. (T. 260-263).

One further comment in this general regard seems proper. After the Court's refusal to permit plaintiffs to cross-examine Mr. Shreve, they proceeded through a rather extensive direct examination of him, followed by a thorough cross-examination by defendants. Since plaintiffs had thus made Mr. Shreve their witness, we would be justified in considering them to be bound by his testimony, and adop-

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[4] T. 259-260: "THE COURT: The record will indicate [your objection].

"I will make this comment, as briefly as I can, Mr. Steel.

"First, none of the authorities which have been cited are in any way controlling on this Court, the cases to which reference has been made dealing with public authorities.

"Second, the case and line of cases on which you have principally relied, which I understand to be exemplified by *Newark Insurance Company* v. *Saratain*, 20 F. R. D. 583, are in no way applicable to the present situation, and are thoroughly distinguishable on the facts.

"Finally, and most basically, this is the ground on which we rely primarily, it has not been shown as was stated in the course of the Court's ruling yesterday that this witness is a managing agent under the contemplation of Rule 43(b).

"You have made reference to Dr. Pierce's testimony. I call to counsel's attention that you elicited from that witness the fact that the responsibility as a matter of both fact and law remained with him.

"In view of that fact, it cannot be said that this witness is clothed with the authority of a managing agent as that phrase is used in the rules."

tion of such a position would be fully fatal to plaintiffs' cause. Such position is not here adopted.

One other evidentiary area was denied plaintiffs, and once again the record reflects a ruling consistent with the position indicated by the Court during early conferences. Plaintiffs called one Dean Clark, a relocation representative for Urban Redevelopment in the employment of the City of Cincinnati (The City is not, of course, a party to this action.). In fifteen pages of testimony (T. 263 et seq.) Mrs. Clark outlined her duties in assisting persons dispossessed under Urban Redevelopment programs in obtaining new housing. She then identified (T. 278) a proffered exhibit as "a listing from an investment corporation of both White and non-White vacancies in the city." Following objection to the exhibit, the following colloquy appears; it is quoted at length because both plaintiffs' and the Court's positions are reflected (T. 279-287):

> "THE COURT: How does it become material, Mr. Muldrow?
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> "MR. MULDROW: It becomes material, sir, from the viewpoint of Negroes being segregated in public housing by public officials.
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> * * * * *
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> "THE COURT: The only public officials named in this suit are members of the Cincinnati Board of Education, and the Board. Even conceding that there may have been improper action taken by the City of Cincinnati, or the governor of Arizona, or some other public authority, how do we here become concerned with that?
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> "MR MULDROW: We become concerned, Your Honor, because the Board of Education is a public body, and the City of Cincinnati is a public body, being a part of the State of Ohio. And here we have

state action which is practicing segregation upon Negroes, and in that respect it is pertinent to the question of whether or not Negroes are segregated in the Cincinnati Public School System, and whether or not they are receiving equal educational opportunities.

"THE COURT: Mr. Muldrow, how could any order that might issue from this Court be binding on any person, private or public, who is not a party to this action and has not had an opportunity to respond, in either a public or private capacity?

"MR. MULDROW: Our position, Your Honor, on that particular question is that we have before this Court an agency of the state, the Cincinnati Board of Education, which is segregating against Negro children; and further that Negro children are segregated in housing, and that one part of the state cannot segregate, which will affect another part.

"THE COURT: Mr. Muldrow, I don't want to debate with you what some other agency may or may not do. I am only asking how this Court is empowered to take any action with reference to any individual, private or public, who is not a party to this lawsuit?

"MR. MULDROW: The action would be taken against the Cincinnati Board of Education, because we are saying the fact that even though another agency might discriminate, as far as in housing, that this could not be used as a scapegoat for the Cincinnati Board of Education furnishing equal educational opportunity to Negro children.

"The Cincinnati Board has to adjust to segregated housing in order to make equal educational opportunities available to all of its citizens.

"Therefore, an order would be directed to the Cincinnati Board of Education to correct whatever segregation is practiced upon Negro children, even though it might be brought about by another agency. But the Board has to deal with education, and seg-

regated housing affects education. And this is the question, that you cannot get an equal educational opportunity by being confined or restricted to a particular section, and that the Board has power, or can do something about it to correct that segregation.

* * * * *

"THE COURT: Mr. Carter, in the one or two sessions which you have helpfully participated in, the pre-trial conferences, you contributed very substantially to the forwarding of this matter. The Court stated to you then that while it was all very well to discuss many of the problems that arose in surrounding areas, that unless some disposition could be made on an amicable basis, if this matter proceeded to trial in an action in which you are seeking the extraordinary relief of injunction, we would find ourselves in a situation where we would be bound by the rules of such a procedure.

"If you care to offer anything on the question I have asked Mr. Muldrow, I would be pleased to hear it.

"MR. CARTER: I would, if it please the Court.

"What is being attempted to elicit from this witness is the fact that in a city agency relocating families, that the — in the assistance in relocating families that the agency uses as a part of its information for relocation, lists in which properties are restricted on the basis of race, in assisting persons in finding houses.

"Now, this we think — we think, Your Honor, that this is a part of — we are attempting to show to the Court in some measure the participation of a public agency, not the Board of Education, but another public agency, in the residential segregation which exists in the City of Cincinnati, and * * * on the basis of which the School Board indicates that this is reason, because of housing segregation, geographical segregation, is the reason for the maintenance of the schools which we say are segregated schools.

"Now, it is true, of course, that the Court will not — need not make an inference on the basis of that, that this is a responsibility of the Board of Education. But our view of it is that this is a part of the picture which we think the Court should see and should view and should understand in coming to its conclusion in regard to whether this is or is not a violation of the Fourteenth Amendment; and for these reasons we are attempting to elicit from the witness the procedure in regard to relocation. I understand this witness doesn't go out * * * and find houses, but we are attempting to establish that as part of the process a restricted list is used and is made available to the persons who are relocated by the city, which we think adds to segregation.

"This is the purpose or the intent of this testimony.

"THE COURT: Mr. Carter, the difference between us, and the point that I was attempting to make a few moments ago, is that I fail to see how it becomes material and proper evidence in this case to indicate transgressions or wrongdoings that may have been perpetrated by some other individual or agency.

"For example, I think it might be even entirely arguable that the actions of the governor of Alabama may have had some influence on some people in this district. We recently had within the Southern District of Ohio a national meeting of the Ku-Klux Klan. I am sure that you would not suggest that any evidence with reference to that matter could be brought into this courtroom.

"I strongly suggest to you, gentlemen, that the difference is only one of degree. You are picking an agency of the City of Cincinnati, which is entirely separate legally and factually from the individual Defendants, as well as the defendant entity of the Board in this case.

"I suggest that the fact that there is some geographical proximity does not mean there is any reason for permitting whatever this lady's agency may or may not have done improperly come into case.

"MR. CARTER: Your Honor, * * * we are not attempting to put Mrs. Clark on trial as a defendant. What we are really attempting to do for the Court was to elicit from her some facts in regard to the relocations of persons, which we think would add to the Court's understanding and knowledge of the problem. We think that the problem, that part of the problem — and I think that it is going to be demonstrated, or that the Defendants are going to say that the problem is not any direct action that they do, but the problem is * * * basically one of segregated housing.

"THE COURT: Mr. Carter, we are exactly back to where we started. I am referring to the statement that I made to you when you were first in Cincinnati a year or so ago, that if we are in an injunctive proceeding we must be bound by the rules controlling an injunctive proceeding in the United States District Court. That does not in my conception extend to embracing and hearing the transgressions by agencies other than those named in the complaint.

"MR. CARTER: I understand that, Your Honor, but I understood that Your Honor had indicated that to me at the time, that by bringing in other people, that we were bound by the rules. Of course, we recognize that. However, it is my feeling in terms of the whole evidence of what produces, or what causes or what is the basis of what we call segregated schooling here, that this is part of the evidentiary facts which we think we should present to the Court. And particularly we think it is a part of the evidentiary fact, that a part of this is produced by an agency of the City of Cincinnati.

"We respectfully submit that this isn't the same case as the governor of Alabama. I think that the governor of Alabama's action, or the Ku-Klux Klan is more tenuous action. We think here we have a direct agency involved, which is a public agency in the same city as the School Board, which helps create this situation. And this is the reason we want this evidence in.

"THE COURT: Gentlemen, I permitted this to be gone into a little more fully at this time than might otherwise be justified, but I wanted the counsel to understand the Court's position. I think that I understand your position.

"The objection to the Plaintiff's Exhibit Number 1 for identification at the present time will be sustained, subject to the right of the Plaintiffs to reoffer the exhibit when and if it is shown to have some connection with the Defendants in this case."

It is here held that in an action against a board of education charging segregation or failure to desegregate pupils in the school system such board is in no way responsible for action taken or omitted by other public or private agencies or entities and that evidence thereof is not admissible in such action. On that ground the denial of admissibility of the Clark exhibit is reaffirmed and similar reaffirmance is made of other rulings at trial concerning evidence proffered as to actions taken or omitted by non-parties hereto on the same basis.

The conferences referred to in the colloquy between Mr. Carter and the Court occurred before the case was even technically at issue, and at a time when settlement of the issues between the parties, aided as they have been throughout by capable and cooperative counsel on both sides of the table, appeared entirely possible. At that

time areas of discussion were entered into in chambers (and, we were given to understand, even more extensively at conferences in which we did not participate), and this was the reason for our cautioning comment. We conceive any subject to be a proper one for discussion during negotiation that might lead toward settlement of any lawsuit, but that is far from saying that evidence thereof is necessarily admissible. As we have repeatedly attempted to point out, that is particularly true in a case (1) involving broad social concepts (2) in which the extraordinary remedy of injunctive relief is sought. In our considered judgment it is far too easy to be led down the primrose path of platitudes and generalities when discussing such social evils as are claimed to underlie the present cause, and to forget that that path must end at the courtroom door. Once that threshold is crossed, a forum has been entered in which a plaintiff must clearly prove his case if he is to be afforded the extraordinary relief he seeks in a court of equity. (*Goldammer* v. *Fay,* 326 F.2d 268, 270 (10th Cir. 1964); *Allen* v. *Pyrene Mfg. Co.,* 111 F. Supp. 819 (D.N.J. 1953); 43 C. J. S. *Injunctions,* section 192 (1955); 28 Am. Jur. *Injunctions,* section 25 (1959)).[5]

Turning, then, from the temptation to let sympathy

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[5] On a previous occasion we expressed that thought in this manner (Memorandum Opinion filed August 4, 1964):

> "At the request of the attorneys for the parties to the action, on two occasions conferences have been held in chambers with all representatives present and general discussions have been held. Necessarily and appropriately these discussions have gone into subject matters concerning which we have no official power to act, but the doors of our offices will always remain open if all concerned are of the opinion that our participation may be of any assistance. However, when we move from the conference table to the court room we regress to the narrow limits established by the pleadings and it is for that reason that emphasis is placed on the urgent need for a clarification of those issues."

substitute for testimony and perhaps to let inclination prevail over precedent, and having examined what plaintiffs have *not* been able to establish, let us examine what they have in fact established on the record.

At the opening of trial, an agreed and executed stipulation was received in evidence, as were 249 exhibits detailed in it. That Stipulation is a meticulously prepared document consisting of 71 pages, exclusive of 24 pages of carefully arranged Contents and lists of exhibits. Without this document, and the agreements as to exhibits, presentation of plaintiffs' case alone could well have extended over weeks (if not months) instead of days, and appreciation is expressed for the effort and cooperation of counsel in this achievement. While the parties agree that the 72 separate stipulations are factually accurate, defendants have objected to 49 of them as irrelevant and immaterial, and plaintiffs to one on the same grounds. While these objections in many instances have substantial merit, at this stage of the proceedings it is felt that having all of this material in the record may be of present or future assistance and all of the objections are accordingly overruled.

The record before us establishes the existence of a Cincinnati school system organized on what is known as a 6-3-3 basis; i.e., the elementary schools consist generally of kindergarten and grades 1 through 6, junior high schools of grades 7, 8 and 9, and senior high schools of grades 10, 11 and 12. During the 1964-1965 school year there were 72 elementary schools, 16 high schools, 6 comprehensive schools, 1 college preparatory high school, 1 vocational and technical high school, and 9 special schools. This organization is shown by Stipulation 3, which establishes the following student enrollment for the 1964-65 school year:

Total in elementary schools		55,906
White pupils	34,122	
Negro pupils	21,784	
Junior high school total		17,163
White pupils	10,409	
Negro pupils	6,754	
Senior high school (including college preparatory high school)		14,691
White pupils	10,311	
Negro pupils	4,380	
		87,760

The Stipulation, largely through its Joint Exhibits, further establishes in great detail the historical background culminating in this tabulation of school population. These Exhibits not only show the general increase of the school population over the years, but establish the racial trends in that population as well. Included are figures showing the racial composition of schools which have been opened and closed and virtually all conceivable data in these areas are supplied. Other Joint Exhibits (many of which are, as hereinabove indicated, of doubtful materiality) contain masses of statistical data, maps of residential areas indicating racial compositions and records establishing facts concerning the employment and placing of Negro and white personnel. In their brief, defendants summarize this portion of the record in the following statement, which we adopt as fair:

> "The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended en-

> tirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply a result of the racial composition of the neighborhoods which they serve."

The Stipulation then goes on to establish, again largely through its Joint Exhibits, vast masses of factual material concerning record-keeping practices, curriculum programs and the results of extensive pupil testing operations. To some extent overlapping the areas just mentioned, other Joint Exhibits deal with aspects of many of the individual schools, and with such matters as transportation, the use of temporary buildings, attendance zone patterns, and changes, and generally allied matters. The second phase of plaintiffs' case consisted of the testimony of experts testifying almost exclusively on the basis of the information provided by the Stipulation. Defendants' summary of this phase, which again is adopted as fair, is as follows:

> "A professor of Education from Antioch College and a professor of Sociology from Washington University, St. Louis, both expressed the opinion that 'a racially unbalanced school seriously affects a child's ability to learn.' (T. 371)"

It is the contention of the defendants, and this is supported by the Stipulation, that in the 78 years since segregation was abolished in Ohio in 1887 (84 Ohio Laws 34; *Board of Education* v. *State*, 45 Ohio St. 555 (1888)), Negro students have attended the neighborhood schools on the same basis as white students. The defendant Board has always operated its schools under what is commonly referred to as the "neighborhood plan," which is provided for by Ohio Revised Code, Section 3313.48, which provides:

"The board of education of each city, exempted village, and local school district shall provide for the free education of the youth of school age within the district under its jurisdiction, *at such places as will be most convenient for the attendance of the largest number thereof.*" (Emphasis supplied.)

While maintaining that race had not been considered in the selection of sites or the designation of attendance zones theretofore, the Board adopted the following resolution as a statement of policy March 9th, 1964, (Stipulation 11):

"11. *Defendants' Policy Statement*: On the 9th day of March, 1964 the defendants agreed on a policy as a guide to officers and employees of the Board in selection of sites for schools, establishment of attendance area boundary lines and assignment of pupils. This policy is as follows:

"(1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long established neighborhood school plan or the requirement of Section 3313.48 R.C. that schools be located where they will be most convenient for the largest number of students.

"The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Sec. 3313.48, and the numerous factors which have always been considered in establishing such zone lines as — safety of children, travel distance and capacity of school.

"(2) The Board does not accept the concept of de

> facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such."

The basic issue in this case is perhaps more clearly stated in the concluding paragraph of this policy statement than anywhere else. The gauntlet is clearly therein thrown down, and we turn to a consideration of whether on the case presented by plaintiffs this Court has either the right or the duty to enjoin establishment of any program "to attempt to balance races" in the subject school system.[6]

In a case involving similar issues, a colleague in this Circuit has recently recognized the well established principle that ". . . public officials are presumed to have properly discharged their duties." (*Craggett* v. *Board of Education of Cleveland,* 234 F. Supp. 381, 386 (N.D. Ohio 1964, Kalbfleisch, J.)). In support of that proposition, Judge Kalbfleisch cited the following: *U. S.* v. *Chemical Foundation, Inc.,* 272 U.S. 1 (1926); *In re State Thread Co.,* 126 F.2d 296 (6th Cir. 1942); and *Donaldson* v. *U. S.,* 264 F. 2d 804 (6th Cir. 1959). This proposition has also been in part at least the basis of determinations sustaining school boards in *Bell* v. *School, City of Gary, Indiana,* 213 F. Supp. 819 (N.D. Ind.), aff'd, 324 F.2d 209 (7th Cir.), cert. denied, 377 U.S. 924 (1963) (Plaintiffs' contend this case to have been "wrongly decided."); *Downs* v. *Board of Education,* 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914 (1965); *Lynch* v. *Kenston School Dist.,* 229 F. Supp. 740 (N.D. Ohio E.D. 1964), (appeal to 6th Circuit Court of Appeals dismissed by plaintiffs-appellants

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[6] At one of the several points at which plaintiffs offer definitions of issues, the following appears (Brief, p. 56): "The issue is whether racial imbalance should be eliminated where it can be done in conformity with sound educational procedures."

July 2nd, 1965); *Northcross* v. *Board of Education*, 333 F. 2d 661 (6th Cir.), cert. denied, 370 U.S. 944 (1964); and *Springfield School Committee* v. *Barksdale*, 237 F. Supp. 543 (D.C. Mass.), rev'd, — F.2d — (1st Cir. Court of Appeals, No. 6481, decided July 12th, 1965).

A careful study of these cases, even read in the light of plaintiffs' arguments and giving special attention to the portions of the opinions on which plaintiffs place emphasis, fails to indicate more than the fact that the courts are giving recognition of the growing awareness of all men of the need to end discrimination in educational as in all other areas. In the present case the moot evidence of the Stipulation and Joint Exhibits alone would have established the increasing tempo of this trend, but plaintiffs added strongly to this showing by their cross-examination of individual defendants. Without exception, in spite of plaintiffs' repeated reference to them as "adverse," these witnesses demonstrated full awareness of and sympathy toward the problems complained of, as well as a knowledge of the intensification of their legal obligation to perform their moral duty in this regard. It would be obtuse in the extreme not to recognize that this action, which would scarce have been given serious attention a decade or two ago, is a product of its times. Indeed, plaintiffs themselves indicate such recognition when they refer to the ". . . changing constitutional interpretations of the Fifth and Fourteenth Amendments to the United States Constitution, as well as provisions of applicable state laws." (Plaintiffs' Brief, p. 4.) Beyond doubt, the courts will not stand idly by and await change by attrition if legal and constitutional rights are shown to have been denied, but in the absence of clear evidence of such denial it is not for the judicial system to be the initiating factor in sociological reform.

Reference has hereinabove been made to the extent to which this case has been prepared, and notation is made of the fact that plaintiffs have had unrestricted access to all of defendants' files and records for some two and a half years. Their failure to produce evidence to establish a policy of segregation or gerrymandering on the part of defendants strongly suggests that such practices have not been engaged in. It is here found that plaintiffs have failed to establish a deprivation of rights under the law or under the Constitution of the United States by the requisite degree of proof and that they are therefore not entitled to the relief prayed for in the Amended Complaint. Rule 41 (b), Federal Rules of Civil Procedure.

Specific comment should be made concerning two other contentions of the plaintiffs and defendants respectively. First, the conclusion here reached applies as well to plaintiffs' rights under Title 42, United States Code, Section 1983 as to their rights under the Constitution. Second, we do not reach the defense of defendants concerning plaintiffs' alleged failure to exhaust administrative remedies.

The facts are found to be as hereinabove indicated, and this opinion is filed as the Court's findings and conclusions in compliance with Rule 52 (a), Federal Rules of Civil Procedure. An order in conformity herewith may be presented.